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Abdul Salim bin Abdul Razak v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS K-05–293–11 OF 2011 AND K-05–294–11 OF 2011
AZAHAR MOHAMED, MOHTARUDIN BAKI AND ROHANA YUSUF JJCA
13 JANUARY 2014

Criminal Procedure — Dangerous drugs — Trafficking — Possession — Whether requirement for possession not crucial to case of trafficking premised upon s 2 of the Dangerous Drugs Act 1952 — Whether trafficking under s 2 made out if accused engaged in 'buying and selling' of drugs — Whether failure of police report to mention role played by agent provocateur not fatal to prosecution's case as evidence of dealings for sale and purchase of drugs overwhelming — Whether facts of case supported finding of common intention amongst accused to trafficking drugs

The appellants in the two appeals herein ('Abdul Salim' and 'Nasir') were convicted and sentenced to death by the High Court on a joint charge under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') of trafficking in 276.54g of heroin and 54.40g of monoacetylmorphines. The prosecution's evidence showed that a police party arrested the appellants after Abdul Salim arrived at a pre-arranged venue in a car with the drugs to exchange the drugs for cash brought by two agent provocateur, PW2 and PW7. The two agents and Abdul Salim had in their discussions earlier finalised the details of the transaction. Nasir was the first to arrive at the venue to ensure and then inform Abdul Salim by telephone that PW2 and PW7 had brought the sum of money agreed upon. In their instant appeals against conviction and sentence, the appellants argued, inter alia, that the trial judge erred in inferring the appellants had common intention to sell the drugs when the fact that they had possession and custody of it had not been established; that the judge was also wrong to hold that a prima facie case had been proved when no recording of the conversations between Abdul Salim and the agent provocateur had been tendered in evidence. It was submitted that the fact the police report against the appellants did not make any mention of PW2's and PW7's involvement was fatal to the prosecution's case.

Held, dismissing the appeals and affirming the convictions and sentences:

(1) The trial judge found that an offence of drug trafficking under s 2 of the DDA had been made out premised on evidence of the sale and purchase transaction between the appellants and the agent provocateur resulting from a pre-discussed arrangement between them. Evidence of the sale

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transaction premised on the prior negotiation was overwhelming and supported the finding made by the trial judge. The requirement for possession was not central to a trafficking case founded under s 2 of the DDA (see paras 20, 26–27 & 30).

(2) The absence of any mention of the agent provocateur in the police report was not fatal to the prosecution's case because the evidence was clear that they were appointed to set up the drugs transaction. The non-mention of the agent provocateur in the police report could not override the clear evidence on the role they had played (see para 23).

(3) There was no doubt the prosecution relied heavily on PW2's evidence in support of the prosecution's narrative that there was a buying and selling transaction between the appellants and the agent provocateur. The trial judge found PW2's evidence to be unshaken and credible despite severe cross-examination. His evidence was materially corroborated by PW6 and other prosecution witnesses. On the facts, the presence of the bag containing the drugs in the car supported the prosecution's case that drugs were delivered as agreed upon between the appellants and PW2 and PW7. The only irresistible inference that could be drawn was that the appellants were fully aware that the bag contained the drugs (see paras 22, 24 & 27).

(4) Nasir's conduct clearly showed there was a pre-planned arrangement between him and Abdul Salim on the sale and delivery of the drugs. Hence, the trial judge did not err in finding that the role played by Nasir was in furtherance of a common intention between the appellants to traffick in the drugs (see paras 16, 18 & 20).

[Bahasa Malaysia summary

Perayu-perayu dalam rayuan ini ('Abdul Salim' dan 'Nasir') disabitkan dan dijatuhkan hukuman oleh Mahkamah Tinggi atas pertuduhan bersama di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') kerana mengedar 276.54g heroin dan 54.40g monoacetylmorphines. Keterangan pihak pendakwaan menunjukkan bahawa pihak polis telah menangkap perayu-perayu selepas Abdul Salim tiba di tempat yang dijanjikan bersama-sama dengan dadah-dadah untuk menukar dadah-dadah tersebut dengan wang tunai yang dibawa oleh dua ejen perangkap, PW2 dan PW7. Kedua-dua ejen dan Abdul Salim telah, dalam perbincangan terdahulu mereka, memuktamadkan butir-butir transaksi. Nasir adalah orang pertama yang tiba di tempat tersebut untuk memastikan dan kemudian memaklumkan kepada Abdul Salim melalui telefon bahawa PW2 dan PW7 telah membawa jumlah wang yang dijanjikan. Dalam rayuan-rayuan mereka ini terhadap sabitan dan hukuman, perayu-perayu menghujahkan, antara lain, bahawa hakim bicara khilaf dalam membuat kesimpulan bahawa perayu mempunyai niat bersama untuk menjual dadah-dadah tersebut sedangkan fakta bahawa

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A mereka mempunyai milikan dan jagaan tidak dibuktikan; bahawa hakim juga khilaf dalam memutuskan bahawa satu kes prima facie telah dibuktikan apabila tiada rakaman perbualan antara Abdul Salim dan ejen perangkap dikemukakan dalam keterangan. Dihujahkan bahawa fakta bahawa laporan polis terhadap perayu-perayu tidak menyebut tentang penglibatan PW2 dan
B PW7 adalah menjejaskan kes pendakwaan.

Diputuskan, menolak rayuan-rayuan dan mengesahkan sabitan-sabitan dan hukuman-hukuman:

C (1) Hakim bicara memutuskan bahawa kesalahan mengedar dadah di bawah s 2 ADB telah dibuktikan berdasarkan keterangan transaksi jual beli antara perayu-perayu dengan ejen perangkap hasil daripada perancangan yang telah dibincangkan terlebih dahulu antara mereka. Keterangan transaksi jualan berdasarkan rundingan terdahulu adalah amat banyak
D dan menyokong dapatan yang dibuat oleh hakim bicara. Keperluan untuk milikan bukan keutamaan dalam kes pengedaran di bawah s 2 ADB (lihat perenggan 20, 26–27 & 30).

(2) Ketiadaan apa-apa sebutan mengenai ejen perangkap dalam laporan polis
E tidak menjejaskan kes pendakwaan kerana keterangan adalah jelas bahawa mereka dilantik untuk memerangkap transaksi dadah. Tidak menyebut ejen perangkap dalam laporan polis tidak mengatasi keterangan jelas mengenai peranan yang mereka mainkan (lihat perenggan 23).

F (3) Tiada keraguan bahawa pihak pendakwaan banyak bersandarkan pada keterangan PW2 dalam menyokong naratif pendakwaan bahawa terdapat transaksi belian dan jualan antara perayu-perayu dengan ejen perangkap. Hakim bicara memutuskan bahawa keterangan PW2 adalah
G tetap dan kredibel tanpa mengira pemeriksaan balas yang tegas. Keterangannya disokong secara material oleh PW6 dan saksi-saksi pendakwaan yang lain. Berdasarkan fakta, kewujudan beg mengandungi dadah-dadah dalam kereta tersebut menyokong kes pendakwaan bahawa dadah-dadah tersebut dihantar seperti yang dijanjikan antara
H perayu-perayu dan PW2 dan PW7. Satu-satunya kesimpulan yang boleh dibuat adalah bahawa perayu-perayu sedar bahawa beg tersebut mengandungi dadah-dadah (lihat perenggan 22, 24 & 27).

(4) Tindakan Nasir jelas menunjukkan bahawa perancangan yang dibuat
I terlebih dahulu antaranya dengan Abdul Salim mengenai jualan dan hantaran dadah-dadah tersebut. Oleh itu, hakim bicara tidak khilaf dalam peranan yang dimainkan oleh Nasir adalah lanjutan niat bersama antara perayu-perayu untuk mengedar dadah-dadah tersebut (lihat perenggan 16, 18 & 20).]

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Notes

For cases on trafficking, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1929–1932.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, And (4) Ng Ah Kiat v PP [1987] 2 MLJ 336; [1987] CLJ Rep 241, SC (refd)
Chow Kok Keong v PP [1998] 2 MLJ 337, FC (refd)
Ghazalee bin Kassim & Ors v PP and other appeals [2008] 3 MLJ 473; [2009] 4 CLJ 737, CA (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636, FC (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 3 AMR 404, CA (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)
PP v Sa'ari bin Jusoh [2007] 2 MLJ 40, FC (refd)
Teh Geok Hock v PP [1989] 3 MLJ 162, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39B, 39B(1)(a), (2)
Penal Code s 34

Appeal from: Criminal Trial No 45A-07 of 2011 (High Court, Alor Setar)

Burhanuddin bin Abdul Wahid (Burhan & Co) for the appellant.
Lailawati bt Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] In the High Court four accused were jointly charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the conclusion of the trial, the learned JC acquitted and discharged the first and the fourth accused but found the second and the third accused guilty. The second and the third accused were convicted and sentenced to mandatory death sentence under s 39B(2) of the DDA. Both of them lodged their appeals on their convictions.

[2] In Appeal No K-05–293–11 of 2011 the appellant, Abdul Salim bin Abdul Razak was the second accused at the High Court. The third accused, Nasir bin Hamzah is the appellant in Appeal No K-05–294–11 of 2011. We heard both their appeals together on 27 August 2013. We have dismissed their

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appeals and we now set out our reasons for our decision.

[3] For convenience, in this judgment we will refer to the appellants as how they were referred to in the court below.

BRIEF FACTS

[4] The narration of the prosecution's case can be summarised as these. On 8 February 2010, Sergeant Abu Bakar bin Hj Taib ('PW2') received information from the informer that the second accused could supply them with heroin in pounds. PW2's superior ASP Wan Zulkefli bin Sahabaludin ('PW3') appointed PW2 and PW7 (Kopl Zaini bt Derani) as agent provocateurs to act as a husband and wife team to buy drugs from the second accused.

[5] Two days later on 10 February 2010 the agent provocateurs, PW2 and PW7 together with the informer met the second accused at Seagate Food Court in Penang where the informer introduced both PW2 and PW7 to the second accused. They discussed the sale of drugs at Naza Cafe in the Seagate Food court, which culminated into an agreement that the second accused agreed to sell 10lbs of heroin at RM9,000 per pound. The delivery was agreed to be executed at night at a place to be informed later.

[6] At 7.45pm the second accused called PW2 to meet his partner the third accused at Bandar Baharu Toll Plaza to show the monies. At 8.20pm PW2 and PW7 drove to the Bandar Baharu Toll Plaza in a Mercedes Benz WJC 4500. On their way the second accused called to inform PW2 that the third accused was already waiting at the Bandar Baharu Toll Plaza. Upon their arrival at the said Toll Plaza at 9.45pm the third accused was waiting besides a white Proton Wira PGD 4572 together with the fourth accused (his brother). The third accused went to see the monies showed by PW7. After which the third accused called the second accused and informed PW2 that the drugs would be brought by the second accused and his wife. While waiting they decided to go for a drink. They went in separate cars but returned back to the Bandar Baharu Toll Plaza upon being informed that the second accused was arriving with his wife.

[7] At 11pm the second accused arrived in a blue Proton Iswara PCM 1273 driven by his wife, the first accused. Upon arrival the first accused went to the ladies room. The second accused went to PW2's car and brought PW2 to his car. The second accused then showed the drugs which were put in a blue Garfield bag placed in the front passenger's seat.

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[8] Having seen the drugs shown by the second accused, PW2 signalled the raiding team led by PW4 (Insp Muslim bin Ellias). The raiding team arrested the second, third and fourth accused, while PW7 arrested the first accused who was coming out of the ladies room.

[9] At the High Court the four accused were jointly charged and tried for trafficking in 330.94g of dangerous drugs (276.54g of heroin and 54.40g of monoacethymorphines). The charge reads as follows:

> Bahawa kamu bersama-sama pada 10 Febuari 2010, jam lebih kurang 11.15 malam, di tempat letak kereta Plaza Tol Bandar Baharu, dalam Daerah Bandar Baharu, di dalam Negeri Kedah Darul Aman, telah di dapati memperedar dadah berbahaya. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 seberat 330.94 (iaitu 276.54 gram Heroin dan 54.40 gram monoacethymorphines). Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan

[10] At the end of the prosecution case the learned JC found that a prima facie case has been made out against all the four accused and called them to enter their defence. All the four accused chose to testify on oath. As indicated earlier, at the conclusion of the trial the learned JC having found that both the first and fourth accused had raised a reasonable doubt on the prosecution's case, acquitted and discharged the both of them. However the learned JC found the second and the third accused failed to raise any reasonable doubt on the prosecution's case. The second and third accused was convicted and imposed with the mandatory death sentence under s 39B(2) of the DDA.

[11] In his judgment the learned JC essentially found that:

(a) the prosecution had established possession and invoked s 37(d);

(b) there was a pre-arranged plan to constitute common intention under s 34 of the Penal Code; and

(c) the meeting between PW2 and PW3 to ensure the monies were available constitute common intention on the part of the third accused

[12] The main complaint raised by the second accused in this appeal is that there is no prima facie case established against the second accused for the following reasons:

(a) that there was no agent provocateur involved since the police report (exh P7) did not state so and no record of teleconversation between the accused and the agent provocateur was tendered as evidence;

(b) non-existence of 'wang tunjuk'; and

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(c) failure to prove that the Garfield bag was in the custody of the second accused;

[13] The third accused raised the following grounds of appeal:

(a) exclusive possession not proven;

(b) no trafficking under s 2 can be invoked against the third accused;

(c) mere knowledge do not constitute possession;

(d) common intention wrongly inferred;

(e) failure to produce phone recording; and

(f) wrong drugs exhibit addressed by the learned JC.

[14] From the above, we find that there were some common grounds raised by the both of the appellants in these two appeals. Having heard the submissions of learned counsel representing both the appellants, having read the written submissions of parties and upon our scrutiny of the appeal records before us, we find these two appeals can be disposed of by deliberating on the following issues:

(a) whether the learned JC had correctly inferred common intention;

(b) whether a prima facie case was made out;

(c) issue of possession and trafficking under s 2; and

(d) whether there is any misdirection by the learned JC on the drugs exhibit.

COMMON INTENTION

[15] For the third accused it was argued by learned counsel, Dato' Seri Mohammad Shafee bin Mohammed that the learned JC erred in concluding that the third accused shared the same intention with the second accused to sell drugs based on the fact that he went to PW2 and PW7 to see the money. It is the contention of the third accused that PW2 in fact was just making a presumption that the third accused was in fact asking about the money with regards to the drugs dealing.

[16] Now, the learned trial judge found that there was common intention under s 34 of the Penal Code between the second and third accused. The learned JC found so upon the evidence on the conduct and role played by the third accused in that he came earlier to the Plaza Toll to ensure PW2 had the monies, and the telephone call by the second accused to PW2 that the third accused will meet him to see the monies. The learned JC in his judgment found that all these facts go to prove that there was a pre-arranged plan between the

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second and the third accused. We do not find error in the finding made by the learned JC on the facts of the present case, that the act and the role played by the third accused was therefore in furtherance of common intention to traffic in the drugs in question. We say so for the following reasons.

[17] It is a trite law that common intention requires prior meeting of the minds and presupposes some prior concert (see *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, And (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] CLJ Rep 241). Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention can develop on the spot and without any long interval in time. Hence common intention can be inferred from the facts and circumstances of the case as well as the conduct of the person. In *Ghazalee bin Kassim & Ors v Public Prosecutor and other appeals* [2008] 3 MLJ 473; [2009] 4 CLJ 737 the Federal Court held that s 34 of the Penal Code can be invoked by the prosecution to prove that although an accused may not directly commit the criminal act but yet he is involved in a series of other acts with the others. Thus the accused need not even be present together with the others. Participation is sufficient so long as there was a pre-arranged plan to commit the offence charged.

[18] On the facts and circumstances of the present case we do not find error committed by the learned JC in his conclusion on common intention The learned JC had scrutinised the entire evidence before him and made his findings of fact that the conduct of the third accused clearly showed there was a pre-plan arrangement entered between him and the second accused on the sale and delivery of the drugs exhibit. Hence we find no misdirection by the learned JC on this finding.

[19] Learned counsel further raised a legal issue of whether or not common intention can be inferred on the third accused when the prosecution did not prove exclusive possession on the part of the third accused, bearing in mind that the drugs was found in the car of the second accused. Hence according to learned counsel joint possession was not proven to bring about the guilt of the third accused under s 39B of the DDA.

[20] As we have alluded to earlier the learned JC is entitled to infer from the facts and evidence before him on the element of common intention under s 34 of the Penal Code to traffic in drugs, the finding of which we agreed. The requirement of possession is not central to a trafficking case founded under s 2 of the DDA as discussed by the Federal Court in *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560. Thus we are unable to agree with learned counsel's argument on this issue.

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A PRIMA FACIE CASE

[21] Learned counsel for the second accused, Encik Burhanuddin bin Abdul Wahid contended that the learned JC erred in his finding that a prima facie case had been made out, in the light of the failures on the part of the prosecution in the following areas; to tender as evidence any 'wang tunjuk'; to prove that the Garfield bag was in the custody of the first accused; to produce the record of telephone conversation between the second accused with the agent provocateurs as alleged. Further to that, it was contended that even exh P7 the police report lodged makes no mention of the involvement of agent provocateurs.

[22] In our view the pertinent question to be asked on the issue of a prima facie case is this; whether it is safe to convict the accused on the evidence before the court on a totality of evidence before it upon a maximum evaluation, if he elects to remain silent (*Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203). The prosecution's evidence must therefore be judicially scrutinised on a maximum evaluation and subjected to rigorous test of credibility. In the present case there is no doubt the prosecution relied heavily on the evidence of PW2. In this regard we find the learned JC in his judgment did scrutinise the evidence of PW2 where in his judgment at para 19 he said, 'Keterangan SP2 telah di soal balas dengan agressif oleh peguambela-peguambela keempat-empat OKT. Bagaimanapun saya dapati keterangan SP2 ini tidak digoncang oleh cabaran agressif tersebut'. He further found that the evidence of PW2 was materially corroborated with the evidence of PW6 (Koperal Zaini bt Derani) and various other witnesses of the prosecution. The learned JC upon his careful scrutiny of the prosecution's witnesses found that all the four accused could not have been present at the Toll Plaza by mere chance but in furtherance to the agreement between PW2 and the second accused.

[23] In this regard, we find the absence of any mention of the agent provocateurs in the police report in exh P17 is not fatal to the prosecution's case because it is clear in evidence that the agent provocateurs are appointed to set up the drugs transaction in this case. In *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 the Federal Court held that:

> it is wrong to hold up the first information report as a sure touchstone by which the complainant's credit may invariably be impeached, it can only be used for that purpose with discrimination in much the same way as previous statements by witness are used, so that irrelevant errors in detail are not given exaggerated importance, nor omissions objectively considered in the light of the surrounding circumstances.

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It is amply clear from the above decision of the Federal Court that the non-mention of agent provocateur in the police report exhibited as P7 cannot override the clear evidence on the involvement and the role played by the agent provocateurs.

[24] We agree with the learned JC that the drugs exhibit or the Garfield bag found in the car can give rise to an irresistible inference that knowledge was present on the part of the appellant. On the facts of this case the presence of the Garfield bag supported the narration of the prosecution case on the delivery of drugs as agreed between the third accused, the second accused and the agent provocateurs. The only irresistible inference that can therefore be drawn is that the second and the third accused were fully aware that the Garfield bag contain the drugs to be delivered to PW2.

MISDIRECTION ON DRUGS EXHIBIT

[25] The next issue raised by learned counsel for the third accused is on the misdirection by the learned JC when in his judgment he referred to Hello Kitty bag and not Garfield bag as testified by the witnesses. Upon our scrutiny of the appeal records it is amply clear that the reference made by the learned JC is to the drugs exhibit as produced at the trial marked as exh P20 A to J the learned JC quite clearly was referring to the bag containing drugs found in the front seat of the car of the second accused. It was then a mere inadvertence on his part when he consistently states in his judgment Hello Kitty bag instead of the Garfield bag (exh P19). There was no prejudice to the appellants because the appellants were aware of the drugs exhibits in question and were given ample opportunity to dispute the same. The photographs of the drugs exhibits and the reference made in the course of trial obviously refers to the drugs exhibit found in the Garfield bag. As such we find no occasion of injustice has occurred on the part of the appellants on this inadvertence.

TRAFFICKING UNDER S 2 OF THE DDA

[26] Under s 2 of the DDA there are at least 16 modes of trafficking listed. The word 'trafficking' under s 2 includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, *buying and selling*, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act. In the present case it was found to fall under *buying and selling* of the dangerous drugs. The learned JC in his ground of judgment held that an offence of drugs trafficking under s 2 of the DDA was made out. This finding is premised on the evidence of the sale and purchase transaction between the appellants and the agent provocateurs which resulted from a pre-discussed arrangement between them.

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[27] We find that the learned JC's finding that the second and third accused trafficked in drugs is supported by evidence which clearly disclosed that there was a buying and selling transaction between accused persons and the agent provocateurs. The evidence of buying and selling is premised on the learned JC's acceptance of the testimonies of PW2 who was the agent provocateur. In his judgment the learned JC found that the evidence of PW2 was unshaken and credible despite severe cross-examination. Indeed the testimony by PW2 supported the narration of the prosecution's case that there were buying and selling transaction between accused persons and the agent provocateurs. Following the negotiation and discussions between the second accused with PW2 and PW7 through the introduction of the informer the pricing and the delivery of drugs was arranged and finalised. The second accused did in fact delivered the drugs to the agent provocateurs when he brought them to his car and showed the Garfield bag containing the drugs at the Toll Plaza Banda Baharu as agreed.

[28] The Federal Court in *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 held in that case that since the prosecution's case was founded on negotiated sale of cannabis to the agent provocateur and the court found more than credible evidence on the sale transaction, the offence of trafficking under s 2 of the DDA was made out. The Federal Court then commented on the trial judge for being unduly concerned with the issue of exclusive possession when the prosecution case was not based on custody and control invoking presumption of possession or possession of more than 200g or more cannabis under s 37(d) or (da)(iv) of the DDA.

[29] We draw similarities on the facts of this case with that of the Federal Court decision in *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560. In that case the prosecution's case was premised on trafficking based on negotiated sale of cannabis to the agent provocateur. The Federal Court found that there was more than credible evidence that the respondent acted in concert on the sale of cannabis and hence the case fall within s 2 of the DDA.

[30] We are mindful of the list of cases that illustrate the point that the general definition of trafficking under s 2 is subjected to the contextual facts of each case (see *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162, *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337 and *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 3 AMR 404). In the lines of authorities the court relied on 'possession' or 'carrying' to invoke s 2. In such circumstances there would be necessary to first prove possession and knowledge (*Ong Ah Chuan v Public Prosecutor*). On the facts and circumstances of the present case the evidence of sale transaction premised on the prior negotiation are so overwhelming.

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[31] What amount to selling has been defined in *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 40. The Federal Court discussed what is 'selling' under s 2 and to put it simply, it is to deliver goods for money (see *Ghazalee bin Kassim & Ors v Public Prosecutor and other appeals* [2008] 3 MLJ 473; [2009] 4 CLJ 737). On the evidence appearing in the appeal records before us, we have no hesitation to uphold the finding of the High Court that there are ample evidence on the sale transaction to support the offence of trafficking under s 2 of the DDA.

WEIGHT DISCREPANCIES

[32] Learned counsel for the third appellant sought to argue on the issue of weight discrepancies. Both PW3 and PW9 testified gross weight as 4,500g whereas PW8 testified gross weight as 4,553.40g giving a discrepancy in weight of 53.40g though the number of transparent packets containing heroin was consistently ten. Learned counsel contended, that unlike in *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636 where the Federal Court observed the drugs exhibit cannabis would be subjected to environmental factors, in the present case heroin is involved which would not be subjected to the same environmental factors.

[33] We do not agree with the contention of learned counsel. On the facts of the present there was no break in the chain of evidence regarding the handling of the exhibits from the time of seizure to production in court. There was no doubt the drugs tendered in court were the one actually seized. The difference in the gross weight, in the circumstance of the present case, could not be said to have created a doubt as to the identity of the drugs in question. This is clearly addressed by the learned JC in his judgment at para 28. We have no reason to interfere with his finding.

[34] In conclusion we do not find merit in all the grounds raised by both the accused in these appeals. Accordingly, we have no hesitation in dismissing these appeals and confirming the convictions and sentence of death passed against both the accused.

Appeals dismissed and convictions and sentences affirmed.

Reported by Ashok Kumar